APPENDIX

APPENDIX

A. Texas Revised Statutes

Article 3264.

The exercise of the right of eminent domain shall in all cases be governed by the following rules:

1. When real estate is desired for public use by the State or by a county, or a political subdivision of a county, or by a city or town, or by the United States Government, or by a corporation having the right of eminent domain, or by an irrigation district, water improvement district, or a water power control district created by authority of law, the party desiring to condemn the property after having failed to agree with the owner of the land on the amount of damages shall file a statement in writing with the county judge of the county in which the land or a part thereof is situated. It shall describe the land sought to be condemned, state the purpose for which it is intended to be used, the name of the owner, if known, and that the plaintiff and the owner have been unable to agree upon the value of the land or the damages. Where the land lies in two or more counties, in one of which the owner resides, the statement shall be filed in the county of the owner's residence.

2. When such statement is filed with the county judge, he shall, either in term time or vacation, appoint three disinterested freeholders of said county as special commissioners to assess said damages, giving preference to those that may be agreed upon between the parties.

3. The commissioners shall be sworn to assess said damages fairly and impartially and in accordance with law.

4. The commissioners shall promptly set a time and place for hearing the parties, and the day appointed shall be the

earliest practicable day, and the place selected shall be as near as practicable to the property in controversy or at the county seat of the county in which the property is situated.

5. Notice in writing shall be issued by the commissioners to each of the parties interested, notifying them of the time and place selected for the hearing.

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10. When service of notice has been perfected, the commissioners shall at the time and place appointed or at any other time and place to which the hearing may be adjourned, proceed to hear the parties.

Art. 3265.

1. The commissioners shall hear evidence as to the value of the property sought to be condemned and as to the damages which will be sustained by the owner, if any, by reason of such condemnation . . . .

2. When the whole of a tract or parcel of a person's real estate is condemned, the damages to which he shall be entitled shall be the market value of the property in the market where it is located at the time of the hearing.

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5. When the commissioners have assessed the damages, they shall reduce their decision to writing, stating therein the amount of damages due the owner, if any be found to be due, and shall date and sign such decision and file it together with all other papers connected with the case promptly with the county judge.

Art. 3266.

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6. If either party be dissatisfied with the decision, such party may within ten (10) days after the same has been

filed with the county judge file his objections thereto in writing, setting forth the grounds of his objection, and thereupon the adverse party shall be cited and the cause shall be tried and determined as in other civil causes in the county court.

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Art. 3268.

If the plaintiff in the condemnation proceedings should desire to enter upon and take possession of the property sought to be condemned, pending litigation, it may do so at any time after the award of the commissioners, upon the following conditions, to-wit:

1. It shall pay to the defendant the amount of damages awarded or adjudged against it by the commissioners, or deposit the same in money in court, subject to the order of the defendant, and also pay the costs awarded against it.

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3. Should it be determined on final decision of the case that the right to condemn the property in question does not exist, the plaintiff shall surrender possession thereof, if it has taken possession pending litigation, and the court shall so adjudge and order a writ of possession for the property in favor of the defendant, and the court may also inquire what damages, if any, have been suffered by the defendant by reason of the temporary possession of the plaintiff, and order the same paid out of the award or other money deposited; provided, that in any case where the award paid the defendant or appropriated by him exceeds the value of the property as determined by the final judgment, the court shall adjudge the excess to be returned to the plaintiff.

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B. Judgments, Opinions and Orders

1. Court of Civil Appeals

No. 856

IN THE COURT OF CIVIL APPEALS

FOR THE

FOURTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS

W. KENNETH POPE, ET UX, APPELLANTS

v.

THE STATE OF TEXAS, APPELLEE

Appeal from County Civil Court at Law #1
of Harris County

In this condemnation case the appellees, State of Texas and County of Harris, condemned 4.2122 acres of land owned by appellants, W. Kenneth and Katie S. Pope, for the construction of the Southwest Freeway. The expense of acquiring the land for such project was to be shared by the State and County on a 50-50 basis, as long as the maximum did not exceed a state approved market value. The County was to bear the full amount of all costs exceeding the approved market value. The land was appraised by two State-appointed appraisers. One reported the market value to be $128,450, and the other, $146,800. The State accepted the higher figure as the approved value and so notified the County. The County negotiated with the owners for purchase of the property and offered to pay the entire amount of the approved value. The owners refused the offer and condemnation proceedings were instituted. The Special Commissioners awarded the Popes $165,134.70, based on a

March 6, 1959, date of taking. The appellants withdrew this award from the registry of the trial court, except for a small sum to cover taxes. which in effect waived any challenge to the propriety of the taking and left the proper valuation of the land as the sole issue.

In March of 1972 (the delay was due to a protracted trial in a trespass to try title action concerning the land) the case went to trial by jury, which found the market value to be $.85 per square foot or $155,960. The trial court accordingly found that the appellees were entitled to recover $8,393.44 plus interest from the appellants. That amount represented the excess of the amount that the appellants had withdrawn over the value found by the jury.

During the course of the trial each party presented the testimony of one expert witness. V. P. Ringer, who had appraised the property for the appellants, stated that in his opinion the market value was $1.20 per square foot or $220,108.11. H. F. Finley, who was employed and paid by the County, testified that in his opinion the market value was $.40 per square foot or $75,000.

Appellants claim that it was fraud and a violation of due process for the appellees to fail to present evidence of the two State-appointed appraisers and the approved market value. Admittedly, there is a duty on the State to negotiate in good faith with the landowner prior to condemnation. The record indicates that the State negotiated in good faith in this case. In fact, the approved maximum value established by the State and the amount offered by the County to the owners was the higher of the State's two appraisal figures. The appraisal by which a condemning authority determines the market value of property to be acquired is relevant to the offer that will be made in negotiating for an out-of-court acquisition. Public policy and the law re-

quire that the condemning authority exercise good faith in that negotiation. A rule requiring that when, as in this case, good faith negotiation has been admitted, the condemning authority must present to the jury evidence of the appraisal on the basis of which it negotiated would be calculated to fix a minimum which the jury would find to be the value of the property involved. For that reason the rule would discourage the good faith negotiation which public policy requires. Although the State must pay the fair market value, the determination of such must of necessity occur in an adversary proceeding. It is not a suppression of evidence to fail to call an appraiser. State v. Biggers, 360 S.W.2d 516 (Tex.Sup. 1962). It should be noted, however, that in this case the attorney for the County testified that one of the State's appraisers was unavailable and that he was unaware of the existence of the other. A prohibition against the landowner presenting evidence of the State's work product in arriving at an approved value is not a denial of due process. Lapsley v. State, 405 S.W. 2d 406 (Tex. Civ. App.-Texarkana 1966, writ ref'd n.r.e.). It follows that it is not fraudulent nor a denial of due process for the State to fail to present evidence of its approved value or to call as a witness its appraiser whose appraisal furnished the basis for such approved value.

Under the rule of State v. Oakley, 356 S.W.2d 909 (Tex. Sup. 1962), an appraiser may testify as to comparable sales, even though he does not have first-hand knowledge of such sales, if they had been confirmed by the appraiser. The court must instruct the jury not to consider this testimony as evidence that these sales actually did occur, but to consider it only in the process of evaluating the opinion of the appraiser-witness. In this case the two witnesses did testify concerning comparable sales of which they did not have first-hand knowledge, and the trial court properly instructed

the jury. The appellants filed a motion for new trial upon the ground, among others, that the jury was guilty of misconduct in that it had discussed the comparable sales and considered them as evidence of the value of the property taken by this proceeding. After hearing the testimony of two of the jurors on this subject the trial court overruled appellants' motion for new trial.

If the jury considered these comparable sales as evidence of the value of the property taken and harm resulted from such, the appellants would be entitled to a new trial because of jury misconduct. TEX.R.CIV. P. 327. By overruling the appellants' motion for new trial, the trial court impliedly found that there was no jury misconduct. When the testimony concerning such misconduct is conflicting, then the appellate court must accept the trial court's finding that there was no misconduct. Monkey Grip Rubber Co. v. Walton, 53 S.W.2d 770 (Tex. Comm'n App. 1932, opinion adopted). In this case the testimony concerning the alleged misconduct is conflicting. One juror testified that the instructions were read in the jury room and that he saw or heard nothing that might indicate that any of the jurors disregarded these instructions. Nevertheless, he later testified that the jury did discuss the various hearsay sales. Another juror testified that the sales were discussed, but in connection with evaluating the opinions of the two appraisers (which is a proper jury consideration). The trial court was entitled to believe that portion of the evidence which indicated that no misconduct occurred.

The appellants also contend that there was no evidence to support the jury's verdict as to the value of the property taken and that such was contrary to the overwhelming preponderance of the evidence. This position is untenable. Opinion testimony does no more than raise a fact question

for the trier of facts. See Broussard v. Moon, 431 S.W.2d 534 (Tex.Sup.1968). The fact that the jury's finding as to value did not coincide with the opinion of either of the two witnesses does not mean that the verdict had no support in or was against the weight of the evidence. It is the function of the jury to resolve conflicts in evidence and the verdict is supported by the evidence in this case.

Appellants' final point of error relates to the admission, over their objection, of evidence of the ownership of a tract of property designated as "Reserve A." The property taken from appellants was a tract of about four acres. It had about 280 feet of frontage on the east side of a street called Timmons Lane which runs north and south. Its depth was about 650 feet. It was not a corner tract and had no other street frontage than that on Timmons Lane. About a block north of appellants' property was another tract of similar size and shape which fronted on the west side of Timmons Lane. This tract was identified as "A-98." It too had no other frontage. However, between it and Norfolk Street, which runs east and west and crosses Timmons Lane, lay an irregular and narrow strip of land identified as "Reserve A." Reserve A was about 30 feet wide at the end where it fronted on Timmons Lane and less than 10 feet wide at the back end of A-98. Appellants' expert witness testified that the sale of A-98 was a comparable sale, noting that neither it nor appellants' property was a corner tract. On cross-examination the appellees were permitted to show that the purchaser of A-98 in the comparable sale had, two days earlier, also bought Reserve A. The two tracts combined formed a corner tract. The witness admitted that he knew of this situation but had not testified as to the sale of Reserve A because it was not comparable. This testimony of appellants' witness and a certified copy of the deed to Reserve A were admitted over appellants' objections.

The trial court did not err in admitting this evidence. The court on several occasions, including a written instruction in the charge, instructed the jury that hearsay evidence as to sales of other tracts was not admissible as evidence as to the facts of those sales, but only to show the basis of the expert witnesses' opinions. The evidence in question was relevant as to the comparability of the sale of A-98 and the corresponding weight to be given the opinion of appellants' expert witness which was based in part thereon.

The judgment of the trial court is affirmed.

/s/ Bert H. Tunks
Chief Justice

NO PUBLICATION — Rule 452.

Judgment rendered, and Opinion filed October 17, 1973.

BE IT REMEMBERED:

THAT at the term of the Honorable Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1973, present BERT H. TUNKS, Chief Justice, and Associate Justices EDWARD D. COULSON and CURTISS BROWN.

No. 856

In the cause

W. KENNETH POPE, ET UX

Appellants,

From ..... Harris County

Tr Ct # 93,317

Opinion by Tunks, CJ

THE STATE OF TEXAS

Appellee,

the following judgment was rendered October 17, 1973:

"This cause, being an appeal from the judgment rendered and entered by the court below on December 7, 1972, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there is no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be affirmed in all things. It is further ordered that the appellants, W. Kenneth Pope, et ux, Kate Pope, and their surety, United States Fidelity and Guaranty Company, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance."

THAT at the term of the Honorable Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas, begun and holden at Houston on the 1st Monday of October, A. D. 1973, present BERT H. TUNKS, Chief Justice, and Associate Justices EDWARD D. COULSON and CURTISS BROWN.

No. 856

In the cause

W. KENNETH POPE, ET UX

Appellants,

From ..... Harris County

Tr Ct # 93,317

Opinion by Tunks, CJ

THE STATE OF TEXAS

Appellee,

the following order was rendered November 7, 1973:

"It is ordered that appellants' motion for rehearing be overruled."

2. Supreme Court of Texas

IN THE SUPREME COURT OF TEXAS

March 6, 1974

B-4342.

W. KENNETH POPE ET UX.

v.

THE STATE OF TEXAS *et al.*

From HARRIS COUNTY, FOURTEENTH DISTRICT.

Application of petitioner's for writ of error to the Court of Civil Appals for the Fourteenth Suprme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, W. Kenneth Pope and wife, Kate Pope, and their surety, United States Fidelity and Guaranty Company, pay all costs incurred on this application.

April 24, 1974

No. B-4342.

W. KENNETH POPE ET UX.

v.

THE STATE OF TEXAS ET AL.

From HARRIS COUNTY, FOURTEENTH DISTRICT.

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

C. Record of Preservation of Error

1. Popes Amended Motion for New Trial in Trial Court

31.

The verdict and judgment were obtained by and are the result of the fraud of the State and County and their employment of a procedure depriving Defendants of due process of law and denying them equal protection of the laws under both the State and Federal Constitutions. Article 1, Section 17, Texas Constitution, mandatorily requires the State of Texas and all of its agencies to pay adequate compensation (market value) for property taken under the power of eminent domain. The Fourteenth Amendment to the Federal Constitution and Article 1, Section 19, Texas Constitution, imposes the duty on the State and its agencies exercising eminent domain to adopt and pursue a procedure to determine and to pay adequate compensation in a manner that treats all property owners fairly and accords procedural due process. The State of Texas has adopted a detailed procedure for the purpose of assuring that adequate compensation is paid when eminent domain is exercised to acquire property for a highway, but this case was tried in defiance of rather than in compliance with such procedure.

This proceeding was brought in the name of the State of Texas by the County of Harris as a part of what is commonly called a 50-50 project under Article 6673e-1, V.A.C.S. In this type of project, the acquisition of land for a highway is handled by the County, but the State participates in the costs of land acquisition up to 50% thereof. Pursuant to the mandate of Article 1, Section 17, Texas Constitution, Article 6673e-1, V.A.C.S., requires the State and County to offer and pay market value for property acquired. This requirement is in addition to that of Article 3264, R.S.

1925, which, in requiring a bona fide effort to agree by offering to pay market value, implicitly requires payment of market value in accordance with the constitutional mandate.

Pursuant to the foregoing constitutional and statutory prescriptions, prior to initiation of this proceeding, the State Highway Department had adopted a Right of Way Manual promulgating rules and regulations to accord due process to owners of land sought for highway purposes and to prescribe procedures to insure that every effort was made to offer and pay such owners the market value of their property. The Manual requires that appraisals to determine market value of property be made, that either (1) the County recommend market value to the State Highway District Office, or (2) the District Office, on the basis of appraisals, determine and approve the market value of property to be acquired, and that the approved market value determined under either such procedure be reviewed for approval by the State Highway Right of Way Engineer in Austin.

This procedure was employed in determining the amount to be offered to Defendants. Under this procedure, the State and the County determined that the market value of Defendants' property taken was approximately One Hundred Forty Six Thousand Eight Hundred and no/100 ($146,800) Dollars, and this amount was offered to Defendants sometime during the year 1958.

Despite the State and County having determined as early as the year 1958, that the approved market value of Defendants' property was approximately $146,800, in the trial of this cause, without any change of the approved market value being made by the State Highway Department or the Commissioner's Court of Harris County, the County contended and presented opinion testimony that the market

value of Defendants' property was only Seventy Five Thousand and no/100 ($75,000) Dollars. This contention and evidence were presented despite the constitutional, statutory and Right of Way Manual duties of the State and County and despite the fact that the appraisal of the witness testifying to the figure of $75,000 was rejected when the approved value was adopted. The purpose of presenting such a ridiculously low figure was to induce the jury to reach a verdict in an amount much lower than the market value presented by Defendants.

This is evident by the argument made to the jury by Plaintiff that the jury was authorized to adopt any figure that was within the range of the opinions of the witnesses.

The testimony of market value of $75,000 was presented despite the fact that the approved market value of the State Highway Department was based in part on the appraisal of Mr. Thomas H. Bearden, a member of the American Institute of Real Estate Appraisers, determining that Defendants' property had a market value of $146,800 on July 15, 1958. At the time of this trial, Mr. Bearden was actively engaged in the appraisal business, with an office at 3633 Allen Parkway, Houston, Texas. Nevertheless, Mr. Bearden was not called as a witness by the State and County.

The foregoing shows deliberate pursuance of a procedure designed to prevent presentation of the approved market value of the State to the jury and to induce the jury to believe that Defendants had asked an inordinately high award. The verdict evidences the result. The jury in practical effect "split the differences". Due process requires that a judgment obtained through such unfair practices and procedure be set aside and a new trial granted.

2. Points of Error in Brief in Court of Civil Appeals

POINT ONE

(Assignment No. 31)

The verdict and judgment were obtained by fraud and in violation of the Fourteenth Amendment, U. S. Const., and Sections 17 and 19 of Article I, Texas Const. In accordance with the Fourteenth Amendment, the Constitution and laws of the State of Texas and the Right-of-Way Manual of the Texas Highway Department, the State determined the value of Defendants' 4.2122 acre tract of land to be $146,800. To make a bona fide effort to agree with Defendants on the market value of their land in compliance with the Constitutions, laws and Manual, the State offered Defendants its approved market value of $146,800. With the State having made this offer, Defendants admitted that the only issue before the Court was the market value of the land taken and by such admission eliminated the issue of a good faith effort being made by the State. Nevertheless, after Defendants had presented their evidence of its approved market value, but presented evidence that the market value of the land taken was $75,000. The procedure employed was a fraud on the Court and Defendants, was in violation of the Fourteenth Amendment, the Constitution and laws of the State of Texas and resulted in a verdict and judgment prejudicial to Defendants.

3. Grounds in Motion for Rehearing in Court of Civil Appeals

GROUND ONE

The Court erred in overruling Point One in the Brief for Appellants, reading as follows:

[Point One (above) was restated here]

GROUND TWO

The Court erred in holding that the mandate of the Fifth and Fourteenth Amendments, United States Constitution, and Sections 17 and 19, Texas Constitution, that no person's property shall be taken without payment of fair or adequate compensation was satisfied in the instant case by the State of Texas making a good faith effort with Defendants to negotiate to purchase their property before instituting proceedings to condemn the same.

GROUND THREE

The Court erred in holding that after the State of Texas had made a good faith effort to negotiate with Defendants to purchase their property, it had no duty under the Fifth and Fourteenth Amendments, United States Constitution, and Sections 17 and 19, Texas Constitution, to deal fairly with Defendants in the trial of the case by presenting evidence of the State approved market value of Defendants' property.

GROUND FOUR

The Court erred in holding that the act of the County, as agent for the State, in failing or refusing to present evidence at the trial of the approved market value of the State and that its conduct in presenting testimony of market value of Defendants' property in an amount equal to approximately 51% of the approved market value of the State by an appraiser who the State refused to employ was not a fraud on the Court and Defendants and was not a denial of due process to Defendants under the State and Federal Constitutions.

GROUND SIX

The Court erred in holding that it was not a suppression of evidence denying due process to Defendants for the State to fail and refuse to present evidence of its approved market value.

4. Points of Error in Application for Writ of Error

POINT ONE

The verdict and judgment were obtained by fraud and in violation of the Fifth Amendment and Due Process Clause of the Fourteenth Amendment, U. S. Constitution, and Section 17 and 19, Article I, Texas Constitution. In accordance with the Due Process Clause of the Fourteenth Amendment, Sections 17 and 19, Article I, Texas Constitution, the laws of the State of Texas and the Right of Way Manual of the Texas Highway Department, the State determined the market value of Petitioner's 4.2122 acre tract of land to be $146,800. To make a bona fide effort to agree with the Popes on the market value of their land in compliance with such constitutional provisions, laws and Manual, the State, through the County of Harris, offered the Popes the approved market value of $146,800. With this offer having been made, the Popes accepted the sum equal to the award of Special Commissioners deposited in Court and admitted that the only issue before the Court was the market value of the land taken and by such admission eliminated all other issues. Nevertheless, at the trial after the Popes had presented their evidence and rested, the State, through the County, did not disclose to the Court or the Popes, or present evidence of its approved market value, but, by an appraiser the State refused to approve, presented evidence that the market value of the land taken was $75,000. The Court of Civil Appeals erred in failing to hold that the procedure employed by the

County was a fraud on the Court and the Popes, was in violation of the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment, Sections 17 and 19, Article I, Texas Constitution, and the laws of the State of Texas and resulted in a verdict and judgment prejudicial to the Popes.

POINT TWO

The Court erred in holding that after the State (through the County) had made a good faith effort to negotiate with the Popes to purchase their property by offering the approved market value, the State had no duty under the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, United States Constitution, and Sections 17 and 19, Article I, Texas Constitution, to deal fairly with the trial court and the Popes in the trial of the case by disclosing the State approved market value and presenting evidence thereof.

POINT THREE

The Court erred in holding that the conduct of the County, as agent for the State, in failing or refusing to disclose to the Court and the Popes and to present evidence at the trial of the State's approved market value of the Pope's land and its conduct in presenting testimony of market value in an amount equal to approximately 51% of the State approved market value by an appraiser who the State refused to employ was not a fraud on the Court and the Popes and was not a violation of the Fifth Amendment, U.S. Constitution, and was not a denial of Due Process under the Fourteenth Amendment and Section 19, Tex. Const.

POINT FOUR

The Court erred in holding that the conduct of the County, as agent for the State, in failing and refusing at

the trial to disclose to the Court and the Popes, and to present evidence of, the State approved market value was not a suppression of evidence denying due process of law to the Popes under the Fourteenth Amendment and Section 19, Texas Constitution.

POINT SIX

The Constitution of the United States contains these mandates: Fifth Amendment — "nor shall private property be taken for public use, without just compensation"; Fourteenth Amendment — "nor shall any state deprive any person of life, liberty, or property, without due process of law". The Texas Constitution commands: Section 17, Article I — "No person's property shall be taken . . . without adequate compensation being made"; Section 19, Article I — "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities . . . except by the due course of the law of the land." The Court erred in holding that these mandates were satisfied by the State (through the County) making a good faith effort to purchase the Pope's property at the State's approved market value before instituting condemnation proceedings, and that such constitutional provisions impose no further duty on the State at the trial to deal fairly with the Popes and the Court, by disclosing, and presenting evidence of, the State's approved market value.

5. Grounds in Motion for Rehearing on Application for Writ of Error

This Motion urged and restated as grounds for rehearing, Points One, Two, Three, Four, and Six of the Application for Writ of Error as quoted above.